IN THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1973

No. 73-640

DWIGHT GEDULDIG, Appellant,

vs.

CAROLYN AIELLO, individually and on behalf of all others similarly situated, Appellees.

DWIGHT GEDULDIG, Appellant,

vs.

AUGUSTINA D. ARMENDARIZ, et al., individually and on behalf of all other women similarly situated, Appellees.

Consolidated Cases on Appeal from the United States District Court for the Northern District of California

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SUPPLEMENTAL BRIEF

SUBJECT INDEX

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ONLY 8% OF NEW JERSEY'S DISABILITY INSURANCE BENEFITS ARE PAID FOR DISABILITIES CAUSED BY PREGNANCY OR CHILDBIRTH, NOT 50% AS CLAIMED BY APPELLANT 2

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Pursuant to Leave of Court granted at oral argument, Appellees submit the following Supplemental Brief. Leave to supplement was granted only with regard to allegations of fact presented for the first time in the Reply Brief.

I

ONLY 8% OF NEW JERSEY'S DISABILITY INSURANCE BENEFITS ARE PAID FOR DISABILITIES CAUSED BY PREGNANCY OR CHILDBIRTH, NOT 50% AS CLAIMED BY APPELLANT.

Attempting to lay a last-minute foundation for his claim that the cost of benefits for childbirth-caused disabilities would be so overwhelming as to justify partially excluding women from coverage on the basis of their sex, Appellant relied heavily in his Reply Brief and at oral argument on his allegation that the cost for such benefits in New Jersey has represented 50% or more of all disability insurance payments. Reply Brief at 17, 20, and Appendix B. However, Appellant has

New Jersey program differs

The New Jersey program differs from that of California in significant respects.[1] The program is divided into three separate parts: state and private plans for disability suffered during employment, and a separate state fund for disabilities suffered during unemployment.

All of Appellant's statistics regarding the cost of benefits for childbirth-caused disabilities relate solely to the relatively small "disability during unemployment" fund. This fund pays out only 10% of total New Jersey disability benefits.[2] Funds are paid to eligible individuals who have been unemployed for a minimum of two weeks

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1 / See, e.g., Brief for Appellees at 7, 10, 16.

2 / This estimate is derived as follows: the state plan for coverage of disability during employment in 1972 covered 66.8% of all covered workers, with private plans covering the other 33.2%.

ing their disability. Because oyers in New Jersey commonly lay

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in 1972, of all benefits paid by the state plan fund and the disability-during-unemployment fund combined, 16.6% of the total were paid out of the "unemployment" fund. No statistics are compiled regarding total benefits paid by private plans, but assuming benefits to be proportional (since the statute requires a benefit package equal to that of the state plan), the "unemployment" fund pays only 10.0% of total New Jersey disability insurance payments. See Appendix A, Tables 9, and 25. These figures were obtained from Donald L. Diefenbach, Principal Statistician, State of New Jersey, Department of Labor & Industry, Division of Planning & Research. They (and the tables contained in Appendices B and C) represent an update of tables designated by the same numbers contained in: New Jersey Department of Labor & Industry, Division of Planning & Research, Two Decades of Temporary Disability Insurance in New Jersey: A Statistical Chronology (March 1970) and New Jersey Department of Labor & Industry, Division of Planning & Research, Temporary Disability Insurance Statistics for New Jersey 1949-1970 (May 1971). Appellees selected 1972, rather than 1973, as the basis for calculations because complete 1973 figures were not available for Table 9. Figures on the first two quarters of 1973 suggest that

off pregnant women more than two weeks before they become disabled, 74.0% of the claims for disability caused by pregnancy or childbirth have been paid out of the small "disability during unemployment" fund.[3]

Appellant's statistics, and the letter preceding it (Reply Brief, Appendix B), indicate that approximately 50.0% of claims from the "disability during unemployment" fund are for disabilities caused by pregnancy and childbirth. What Appellant does not present to the Court is the fact that pregnancy and childbirth disability claims represent only 8.0%[4] of

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there were no significant differences between the 1972 and 1973 covered employment distributions.

3 / In 1970, 74.0% of such benefits were paid out of the "unemployment" fund. In 1972, 74.1% were so paid. See Appendix B, Table 30.

4 / In 1972, 48.9% of all "disability-during-unemployment" benefits were paid for disabilities caused by pregnancy or childbirth. Only 3.4% of regular state plan benefits were paid for such disabilities. Assuming 3.4% of private

total New Jersey temporary disability insurance payments.[5/]

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plan benefits were paid for such disabilities, and weighting these statistics by the size of each fund, slightly less than 8.0% of all disability insurance benefits in New Jersey were paid for disabilities resulting from pregnancy or childbirth. See Appendix C, Table 31.

5/ The New York legislature is currently considering S-2041, a bill which would amend the New York disability laws to cover pregnancy and childbirth related disabilities. According to Joseph Angelo, associate General Counsel, New York Workman's Compensation Board, the estimated cost increase for coverage under the New York state disability insurance program, based on 1972 benefit levels, is approximately $12 million. Total program costs in 1972, without pregnancy-related disabilities, was $350 million.

Throughout this proceeding Appellant has sought to show that extending coverage to women on the same basis it is now granted to men would result in massive cost increases. The New Jersey experience, for the reasons stated above, contradicts rather than confirms Appellant's cost prediction.

II

THE AMENDMENT OF THE HAWAII DISABILITY INSURANCE LAW TO COVER DISABILITIES ARISING FROM NORMAL PREGNANCY AND CHILDBIRTH HAS RESULTED IN ALMOST NO INCREASE IN TEMPORARY DISABILITY INSURANCE RATES.

Appellant, in his Reply Brief, pp. 17-18, states, "[T]he coverage of pregnancy under the Hawaiian disability program has resulted in an increase in disability premiums for females from $4.00 per month to $8.76 per month." In support of this statement he attaches as Appendix C a memorandum from Equitable

Life Assurance Society of the United States to its Hawaii Temporary Disability Policyholders announcing such an increase. The Hawaii amendment, passed May 8, 1973, requires the inclusion of disabilities arising from normal pregnancy and childbirth by Hawaii employers covered by the state program.

Appellant, by failing to place the Equitable Memorandum in its proper context, creates a misleading impression of the Hawaii temporary disability insurance experience. The Hawaii program, unlike the California program, has no state fund, but rather requires and regulates private insurance of Hawaii employees. At least 90 percent of the employees in Hawaii are insured by six insurers,[6] only one of which has raised its rates at all as a result of the

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6 / Those insurers are: Travelers Insurance Company, Industrial Indemnity Insurance Company, Pacific Insurance Company, Pacific Guardian Insurance Company, First Insurance of Hawaii, and Hawaii Insurance and Guarantee Company. This information was obtained in a telephone conversation

May 8, 1973 amendment.[7] Equitable Life Assurance Company, whose rate increase is cited by Appellant, is not

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with Orlando K. Watanabe, Administrator of the Temporary Disability Insurance Division of the Hawaii Department of Labor and Industrial Relations.

7/ That company is Industrial Indemnity. According to Paul Fasi, Assistant Manager of the Industrial Indemnity home office in San Francisco, the rate increase varies according to the percentage of female employees in the insured's workforce as follows:

Females	Increase
0-25%	No Increase
26-49%	7% Increase
50-74%	15% Increase
75-100%	22% Increase

among the major temporary disability insurers in Hawaii[8/] and, Equitable's rate increase, rather than being representative of the insurance company response to the Hawaii amendment, constitutes a distinct aberration in the total Hawaii disability insurance picture.

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8 / This fact was confirmed in telephone conversations with Orlando K. Watanabe, Administrator of the Hawaii Temporary Disability Insurance Division, Paul Fasi, Assistant Manager of the Industrial Indemnity home office in San Francisco, California, and John Jacobs, head of the Temporary Disability Insurance Sales Division of Traveler's Insurance in Hawaii, all of whom indicated that Equitable insures only a small percentage of the Hawaii temporary disability insurance market.

CONCLUSION

For the reasons stated above, neither the Hawaii nor New Jersey figures, presented for the first time in Appellant's Reply Brief, fairly reflect the actual additional cost of covering childbirth-related disabilities under those state programs. The actual experience in both those states instead lend support to Appellees' cost estimates. (Appellees' Brief, pp. 84-89.) Even if the relative or absolute cost of extending coverage to women on the same basis as now provided men is deemed material and relevant to the constitutional issues here presented, which Appellees deny (Appellees' Brief, pp. 89-94), the record is simply devoid of evidence which would support Appellant's cost estimates.

Respectfully submitted,

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Counsel for Appellees

APPENDIX A

TABLE 9

COVERED EMPLOYMENT
TOTAL, STATE PLAN, AND PRIVATE PLANS
BY CALENDAR QUARTER

Year & Quarter	Covered Employment			Percentage Distribution	
	Total	State Plan	Private Plans	State Plan	Private Plans
1971 1	2,006,232	1,276,684	729,548	63.6	36.4
2	2,080,237	1,327,963	752,274	63.8	36.2
3	2,075,348	1,330,627	744,721	64.1	35.9
4	2,062,038	1,345,623	716,415	65.3	34.7
1972 1	2,072,889	1,345,538	727,351	64.9	35.5
2	2,226,858	1,460,894	765,964	65.6	34.4
3	2,243,598	1,483,626	759,972	66.1	33.9
4	2,259,663	1,510,409	749,254	66.8	33.2
*1973 1	2,237,383	1,485,337	752,046	66.4	33.6
2	2,336,750	1,555,700	781,050	65.7	34.3

*Complete Figures for 1973 are not yet available.

TABLE 25
BENEFIT PAYMENTS
STATE PLAN AND DISABILITY-DURING-UNEMPLOYMENT

Year	Benefit Payments			Percentage Distribution	
	Total	State Plan	Disability During Unemployment	State Plan	Disability During Unemployment
1971	65,131,391	53,130,606	12,000,785	81.6	18.4
1972	68,167,910	56,896,393	11,271,517	83.5	16.5
1973	75,617,156	65,433,890	10,183,266	86.5	13.5

APPENDIX B

TABLE 30

SUMMARY OF PREGNANCY AWARDED CASES,
WEEKS COMPENSATED, AND BENEFIT PAYMENTS

STATE PLAN AND DISABILITY-DURING-UNEMPLOYMENT

	State Plan			Disability-During-Unemployment		
Year	Awarded Cases	Weeks Compensated	Benefit Payments	Awarded Cases	Weeks Compensated	Benefit Payments
1971	4670	32,244	1,778,514	14,472	106,224	6,204,219
1972	4719	33,134	1,935,816	12,036	91,086	5,516,640
1973	7364	53,574	3,238,248	10,095	76,598	4,893,901

APPENDIX C

TABLE 31

PREGNANCY AS A PERCENTAGE OF TOTAL PROGRAM
AWARDED CASES, WEEKS COMPENSATED, AND BENEFIT PAYMENTS

STATE PLAN AND DISABILITY-DURING-UNEMPLOYMENT

Pregnancy As A Percentage Of Total

Year	State Plan			Disability-During-Unemployment		
	Awarded Cases	Weeks Compensated	Benefit Payments	Awarded Cases	Weeks Compensated	Benefit Payments
1971	4.9	3.7	3.3	61.8	52.6	51.7
1972	4.7	3.7	3.4	57.3	49.9	48.9
1973	6.8	5.5	4.9	55.7	49.1	48.7